K.C. Cartage, Inc. *and* Local 299, International Brotherhood of Teamsters, AFL–CIO.[1] Case 7–CA–29730

June 23, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On February 25, 1992, Administrative Law Judge Peter E. Donnelly issued the attached supplemental decision. The General Counsel filed exceptions and a brief in support.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, K.C. Cartage, Inc., Carleton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the Respondent shall pay to the following individuals[2] the amounts of backpay set forth in the General Counsel's backpay specification, with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). The amounts of backpay are as follows:

Timothy Carpenter	$2,580.77
David Herrara	1,900.00
Willie Hodges	2,159.88
Sharon Jones	1,544.00
Mark Milioni	2,028.00
Andrew Roof	1,206.00
Joseph Salisbury	1,944.75

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] Of the nine discriminatees named in the compliance specification, the Respondent disputed only the amounts of backpay alleged as to two, Lonsinger and Boese. The judge's supplemental decision awarded backpay only to these two discriminatees, but noted in passing that the Respondent did not dispute the amount of backpay alleged to be due the other seven. The General Counsel excepted to the judge's apparently inadvertent failure to award backpay to those seven discriminatees. We grant the General Counsel's exception in this regard, and award backpay in accordance with the General Counsel's compliance specification.

John Ciaramitaro, Esq., for the General Counsel.
Kenyon S. Calendar, Esq., of Carlton, Michigan, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. A dispute having arisen over the amount of backpay due,[1] the Regional Director, on May 31, 1991, issued a compliance specification and notice of hearing alleging an amount of net backpay due to each of the nine discharged unfair labor practice strikers. Respondent, K.C. Cartage, Inc., represented by its president, Kenyon S. Calendar, responded by a letter dated August 13, 1991, stating that it had no dispute with the amounts of backpay due to and on behalf of seven of the nine discriminatees. Those discriminatees were Timothy Carpenter, David Herrara, Willie Hodges, Sharon Jones, Mark Milioni, Andrew Roof, and Joseph Salisbury. Calendar does, however, dispute the amounts of backpay due to and on behalf of two discriminatees, Mike Boese and Russell Lonsinger. A hearing was held before me on October 15, 1991. Subsequently, briefs were filed on behalf of Respondent and General Counsel, which have been duly considered.[2]

A. *Facts*

1. Boese

It was the practice of Respondent to employ driver trainees. This was how Boese came to work for Respondent approximately a week before the unfair labor practice strike began on September 25, 1989.[3] Boese was not compensated by Respondent during his short employment prior to his discharge on September 25. However, the record discloses he was working with the expectation that following a short training period he would be placed on the payroll as a paid employee. Respondent's payroll records for the year 1989 disclose that 10 individuals thereon classified as trainees were compensated while employed in that classification.

Lonsinger was Boese's trainer. Lonsinger testified that he was under the impression that Boese had been given a written examination previously. He gave Boese a driving test the

[1] The underlying Board Decision and Order dated May 30, 1990, finding that Respondent had unlawfully discharged nine unfair labor practice strikers in violation of Sec. 8(a)(3) of the Act was enforced by the U.S. Circuit Court of Appeals for the Sixth Circuit on April 1, 1991.

[2] General Counsel contended at the hearing that Respondent's answer should be stricken as insufficient under the Board's Rules and Regulations as to discriminatees Boese and Lonsinger and moved that summary judgment be entered on behalf of General Counsel. Respondent was permitted at the hearing to amend its answer to set out a theory of its dispute with the formula applied to determine Boese's backpay. The answer being deemed by me to be otherwise sufficient, General Counsel's motions were denied.

[3] All dates refer to 1989 unless otherwise indicated.

first day of his employment which Boese passed. Lonsinger testified that he saw nothing in Boese's performance that would cause him to recommend that Boese not be retained.

2. Lonsinger

Lonsinger was employed by Respondent in 1989 and apparently was a competent employee. He was promoted to lead driver on September 8, effective September 11, shortly prior to the strike and his discharge on September 25. At that time, his hourly rate went from $9 per hour to $11 per hour.

It also appears that on May 3, Lonsinger was given a traffic citation for running a stop sign while driving a truck for his Employer and was convicted on June 28. He testified that he turned this ticket in to the Respondent at that time as required by Department of Transportation and Respondent's regulations. Thereafter, Calendar was advised, apparently informally, by his insurance agent, Larry Schafer, that his insurance carrier, Northland Insurance Company, was taking the position that Lonsinger, among others, did not meet underwriting guidelines because they had three moving violations within the calendar year 1989. In late August, Calendar spoke to Lonsinger about the problem. Calendar told Lonsinger that because of his driving record, he would have to ''step down'' from driving but was not told whatever other duties he might be assigned. He was not, however, discharged. By letter dated August 4,[4] Northland formally advised Respondent's insurance agent, Larry Schafer, that Lonsinger's driving record, i.e., three moving violations within the calendar year, made him unacceptable as a driver under Northland's guidelines and demanded that a ''Driver's Exclusion Form'' be submitted for both him and Norman Morehead, another driver with an unacceptable driving record. Calendar testified that this form was submitted for Lonsinger. The form certifies that Lonsinger is not driving any autos insured by Northland and obligates Respondent to reimburse Northland for the payment of any losses it incurred while Lonsinger is driving.

Calendar testified that he wrote a termination letter dated August 31 to Lonsinger reading:

> DUE TO EXCESSIVE VIOLATIONS REFLECTED BY YOUR CURRENT MVR, NORTHLAND INSURANCE COMPANY HAS MADE THE DETERMINATION THAT YOU ARE UNACCEPTABLE FOR DRIVING STATUS. THEREFORE SEPARATION ACTION MUST BE TAKEN WITHIN THIRTY DAYS OF LETTER. UNLESS THESE VIOLATIONS ARE REMOVED FROM YOUR MVR, K C CARTAGE, INC. IS LEFT WITH NO ALTERNATIVES. PLEASE ADVISE ME OF ANY CHANGES RELATING TO YOUR MVR.

Calendar testified that he did not mail the letter to Lonsinger but only ''showed'' it to him, and Lonsinger denies ever having seen the letter. Having reviewed the relevant testimony, I am satisfied that Lonsinger's account is correct and that he did not see the August 31 letter.

In any event, in about the second week in September, in an effort to preserve Lonsinger's driving status, Calendar went with Lonsinger to traffic court where, in discussions with the appropriate functionaries, Lonsinger appealed the May 3 ticket and a court date for hearing on the appeal was set for October 9. As set out in detail in the underlying Board decision, an economic strike ensued and Lonsinger was unlawfully discharged on September 25. On October 9, the court accepted Lonsinger's explanation that faulty equipment, for which he was not responsible, caused him to run the stop sign. His driving record was cleared of the three points previously assessed for the violation and reduced Lonsinger's point total for the year to a satisfactory level under Northland's guidelines for drivers. It does not appear that Respondent was ever made aware of the court's action by Lonsinger at any time after October 9. Lonsinger was offered reinstatement on November 17.

B. *Discussion and Analysis*

1. Boese

The backpay for all the discriminatees was arrived at by first calculating an average gross weekly earnings figure. This calculation was made by dividing each discriminatee's total earnings prior to his discharge by the total number of weeks worked prior to discharge. The amount of ''gross backpay'' due to each discriminatee is calculated by projecting and summing by calendar quarter. The average gross weekly earnings throughout the backpay period, which in this case would be from the date of the unlawful discharges on September 25, 1989, until the date discriminatees received Respondent's offer of reinstatement by letter dated November 17, 1989.

Finally, from this gross backpay figure, any interim earnings during the backpay period are deducted to arrive at the net backpay figure.

With respect to Boese, it is undisputed that he had no earnings during his period of employment with the Company. This being the case, the General Counsel concluded that it would allot to Boese as an ''average gross weekly earnings figure'' the same figure as the lowest figure of any of the nine discriminatees. That figure was $377, the same figure allotted to Lonsinger.

Respondent contests that figure and argues that since Boese was never paid, the ''average gross weekly earnings figure'' for him would be zero and therefore Boese is not entitled to any backpay.

The object of relief pursuant to orders of the Board and the courts under the National Labor Relations Act is to restore, insofar as possible, the status quo ante. With respect to discriminatees, this means to restore them to the employment status they had prior to the discrimination occurring and, where appropriate, to award backpay from the date of the discrimination until the date Respondents makes an unconditional offer of reinstatement.

In my opinion, the General Counsel's backpay computation for Boese is appropriate. The facts of this record support the conclusion that Boese would have begun compensated employment at about the time he was unlawfully discharged along with the other economic strikers on September 25. The record discloses that Respondent needed drivers; that Boese had passed a written test and a road test; that he was a satisfactory trainee; and would have been recommended for employment as a driver. While the possibility exists that he

[4] Calendar is uncertain as to when he received this letter, and testified that while Schafer's date stamp shows September 5, a copy may have been faxed to him directly by Northland rather than sent to him by Schafer.

would not have been retained, that possibility is not likely and, in any event, whatever doubts may remain in that regard, was generated by Respondent's unlawful discharge of economic strikers, including Boese on September 25. It is axiomatic that in determining appropriate backpay for the purposes of enforcing backpay specifications, doubts must be resolved against the malfeasor. *Bailey Distributors*, 292 NLRB 1106 (1989).

Respondent's contention that no backpay is appropriate because Boese was employed as a trainee is further diminished since the record discloses that other trainees were in fact compensated while employed in trainee status. In fact, one of those, Larry James Wilcox, was paid at an average gross weekly rate that exceeds the rate assigned to Boese for backpay purposes.

2. Lonsinger

The General Counsel's formula for arriving at a net backpay figure is to calculate gross backpay during the backpay period minus any interim earnings. The backpay period runs from September 25 through November 17, when Lonsinger was offered reinstatement. Respondent does not contest the September 25 date as the beginning of the backpay period but contends that its backpay obligation terminated on September 30, since that is the date that Lonsinger's employment would have been terminated pursuant to the terms of Calendar's letter to Lonsinger dated August 31.

In my opinion, the General Counsel has met its burden of establishing backpay and Respondent has not satisfied its burden of establishing that the backpay period should be limited as it contends.

I am satisfied, based on all the probative evidence in this record, that Respondent did not, despite its letter of August 31, terminate Lonsinger effective September 30. First of all, the letter is equivocal. It contemplates separation only if the traffic citation was not removed from his record enabling him to drive. Lonsinger was a highly regarded employee. His services were so valued that Calendar went with him after the date of the termination letter to see if the citation could be removed from his driving record. Calendar was aware that the conviction was being appealed and, if successful, Lonsinger could continue as a driver. It is strange that while the matter is pending primarily due to Calendar's intervention and assistance in obtaining an appeal of the citation, Calendar would have terminated Lonsinger.

That Lonsinger's employment, in some nondriving capacity, would have continued is clear from Calendar's conversation with Lonsinger wherein they discussed the matter in late August and Lonsinger was told only that he would have to step down from driving, not to be discharged.

Another significant factor suggesting that Lonsinger would not have been terminated September 30 is the fact that well after Calendar became aware of the problem, and after the August 31 termination letter, he was promoted to lead driver on September 11.

In these circumstances, I am not satisfied, as Respondent contends, that Lonsinger's termination became effective on September 30. I further conclude that he would have been employed throughout the entire backpay period and that the backpay calculations set out in the compliance specification for Lonsinger are correct.

C. *Conclusions*

Based on the entire record here, I conclude that Lonsinger and Boese are due the amounts of backpay from Respondent as set out in the General Counsel's backpay specification as follows:

Russell Lonsinger	$2,121.76
Mike Boese	2,262.00

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, K.C. Cartage, Inc., Carleton, Michigan, its officers, agents, successors, and assigns, shall pay to Russell Lonsinger the sum of $2,121.76, and to Mike Boese the sum of $2,262.00, the backpay provided for herein, with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950). These shall be deducted from the amounts due any tax withholding required by law.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.